86-374

NO. _____

Supreme Court, U.S.
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CLERK

In the

Supreme Court of the United States

October Term, 1986

THE STATE OF FLORIDA

Petitioner,

vs.

JOEL ADOLPH SCOTT,

Respondent.

On Petition for a Writ of Certiorari
to the District Court of Appeal
of Florida, Third District

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

1) WHETHER THIS COURT SHOULD EXERCISE JURISDICTION WHERE THE FLORIDA STATE COURT HAS REJECTED THE ANALYSIS OF THIS COURT IN RAKAS V. ILLINOIS, 439 U.S. 128 (1978) AS APPLIED IN RAWLINGS V. KENTUCKY, 448 U.S. 98 (1980) AND CONCLUDED THAT ANY DEFENDANT HAS AUTOMATIC STANDING TO CHALLENGE ANY SEARCH WHICH IS CONTEMPORANEOUS TO HIS ARREST.

2) WHETHER THIS COURT SHOULD ACCEPT JURISDICTION, WHERE THE STATE COURT HAS REJECTED THIS COURT'S ANALYSIS OF PROBABLE CAUSE AND THE USE OF INFORMANTS IN DRAPER V. UNITED STATES, 358 U.S. 307 (1959) AND ILLINOIS V. GATES, 462 U.S. 213 (1983), CONCLUDING INSTEAD, THAT AN INFORMANT WHO HAS ALWAYS GIVEN ACCCURATE AND RELIABLE INFORMATION IN MORE THAN TWENTY (20) CASES, WAS THEREFORE, NOW INHERENTLY UNBELIEVABLE AND SUCH

QUESTIONS PRESENTED
(continued)

INFORMATION COULD NOT AMOUNT TO PROBABLE CAUSE AS A MATTER OF LAW.

TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . i-ii

TABLE OF CITATIONS . . . . . iv-vi

PREFACE vii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 3-5

STATEMENT OF THE CASE 6-19

REASONS FOR GRANTING THE PETITION 20-29

CONCLUSION 30

TABLE OF CITATIONS

UNITED STATES CASES

	Page
Aguilar v. Texas, 378 U.S. 108 (1964).....	29
Draper v. United States, 358 U.S. 307 (1959).....	i, 27, 28
Florida v. Rodriguez, 461 U.S. 940 (1983).....	25
Florida v. Rodriguez, 469 U.S.___ (1984).....	25
Florida v. Royer, 460 U.S. 491 (1983).....	25, 26
Florida v. Zafra, 463 U .S. 1202 (1983).....	25
Illinois v. Gates, 462 U.S. 213 (1983).....	i, 2, 27, 28
Rakas v. Illinois, 439 U.S. 128 (1978).....	i, 19, 21, 22 23, 24
Rawlings v. Kentucky, 448 U.S. 98 (1980).....	i, 21, 22, 23 24

TABLE OF CITATIONS
(continued)

	Page
Spinelli v. United States, 393 U.S. 410 (1969).....	29
United States v. Mendenhall, 446 U.S. 544 (1980).....	26
United States v. Salvucci, 448 U.S. 83 (1980).....	21, 22
Ybarra v. Illinois, 444 U.S. 85 (1979).....	24
UNITED STATES CONSTITUTION	
Amendment IV.....	2, 3
Amendment XIV.....	2, 3
UNITED STATES CODE	
28 U.S.C. §1257(3).....	2
UNITED STATES SUPREME COURT RULES	
Rule 17.1(c).....	2, 20, 26

OTHER AUTHORITIES

	PAGE
Art. I, Sec. 12, Fla. Const.....	2, 4 29
Dean v. State, 478 So.2d 38 (Fla. 1985)...	21
Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980).....	25
State v. Rodriguez, 389 So.2d 4 (Fla. 3d DCA 1980).....	25
State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982).....	25

PREFACE

The Petitioner, THE STATE OF FLORIDA, was the Appellant in the District Court of Appeal of Florida, Third District, and the prosecution in the Florida trial court. The Respondent, JOEL ADOLPH SCOTT, was the Appellee in the Florida District Court and the defendant in the trial court. In this brief, the parties will be referred to as the "State" and "Defendant, respectively.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the attached Appendix and consist of pages A1-A55.

I.

OPINIONS BELOW

The opinion of the Florida Third District Court of Appeal is reported at State v. Scott, 481 So.2d 40 (Fla. 3d DCA 1985). See, also, A44-A46.

The opinion of the Florida Supreme Court denying review will be reported in Southern Reporter Second Series (West 1986), which is Florida's official reporter. The opinion of the Florida Supreme Court is contained herein at A54-A55.

II.

JURISDICTION

On December 17, 1985, the Florida Third District Court of Appeal affirmed the granting of the Defendant's Motion to Suppress. A44-A46. The District Court denied rehearing on January 24, 1986. See, A53; A47-52 (motion for rehearing). On June 27, 1986, the Florida Supreme Court denied the State's petition for review. A54-A55.

The jurisdiction of this Court is invoked under the provisions of Rule 17.1(c) of the Supreme Court; Title 28 U.S.C. §1257(3) and Amendments IV and XIV of the United States Constitution.

Under Article I Section 12 of the Florida Constitution, the interpretation of Florida law and the United States Constitution are identical for purposes of search and seizure issues.

III.

CONSTITUTION AND STATUTORY PROVISIONS

Amendment IV of the Constitution of the United States provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment XIV of the Constitution of the United States provides that:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge

the privileges of immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 12 of the Florida Constitution provides that:

" Searches and Seizures. -- The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violatd. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or thngs to be seized, the

the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."

IV.

STATEMENT OF THE CASE

The Defendant was charged by information with one count of trafficking in cocaine under Section 893.135(1)(b) Florida Statutes arising out of his arrest on April 19, 1984. See, A2-A3. The Defendant filed a motion to suppress, which was granted after a brief hearing.

Relevant to this petition, at the hearing on the motion to suppress, the State vigorously contested the Defendant's standing to contest the seizure of cocaine from the automobile. See, A8-A10; A16-A23; A36-A38. Thereupon, the Defendant testified that he was driving the car in question on April 19, 1984, when he was arrested. A11. He said that he had borrowed the car from

"Lennie Anderson." A12-A13. The Defendant said that he was "in the electric business" and that the car was always made available by, "the people who run the company" to pick up electrical materials. See, A13-A14. The Defendant said that he picked up the car, "[i]nvariably, two or three times a week." A14. He indicated that on each occasion he did not return the car keys (and car) to the owner, but rather simply left them in the parking lot with the car. See, A14.

On the date in question, the Defendant said that he picked up the car at 8:00 o'clock a.m. A15. He said that the windows were open as they "always" were. See, A15. The Defendant said that he was unaware if the trunk keys were with the car since he had not "ever" gone into the trunk. See, A16.

Based upon the foregoing, the Defendant argued that he had "automatic" standing to contest the search because his arrest was illegal. See, A18. The trial court however deferred ruling on the issue of standing and ordered the parties to proceed on the motion to suppress. See, A22-A23.

The present case was based upon a tip from a proven, reliable confidential informant given to Officer J. C. Mendez. See, A2-A3 (police report). Officer J. C. Mendez testified that on April 19, 1984, at about 11:30 o'clock a.m., he received information from a "reliable informant," that a transaction involving two kilos of cocaine was to take place in the 600 block of northwest 28th Street in Miami. See, A24-A26. Mendez said that the informant gave a detailed description of the cars and race and numbers of persons involved, thus:

A: He advised me three cars were involved. One was a red Mercedes Benz, two-door; the other one was a Buick or Oldsmobile, white with a half red vinyl roof. The other one was a silver or greenish Chevy Malibu.

Q: Did he tell you about any of the individuals that would be occupying those cars?

A: He said that there was a seller. He was a White Latin male and the buyers were three or four black American males who occupied the Malibu, red on white vehicle, the Buick or Oldsmobile.

A27.

The informant indicated to Officer Mendez that he didn't know the specific time that the tranasction would occur since the participants still, "had negotiations going on." See, A26. In describing the informant's reliability Officer Mendez said that the informant had, "never" been wrong. See, A25. Mendez then explained

this statement, saying that twenty or more arrests had been made with the informant and the information he gave was never bad. See, A25-A26.

After setting up surveillance, Mendez said that he observed the red Mercedes and the white over red (vinyl roof) car together at the location where the buy was supposed to occur. See, A29. A man later known as "Sanders" was observed sitting on the trunk of the white and red car[1]. See, A29. The white and red car (Oldsmobile) then left the Defendant driving and two other black males was subsequently observed in a Burger King parking lot. See, A29-A31.

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1. The gray or green Malibu was also observed at the location of the transaction when it returned there with the red Mercedes. A30. The Malibu was also described by the informant as having, "out of state tags." See, A34. In fact, the plates on the Malibu were from New Jersey. Id.

The person later known as "Sanders" was in the back seat. See, A30. As the car entered the parking lot, the occupants were observed, "looking around." A30. Based upon their previous experience with narcotics defendants being armed, the police then ordered everyone out of the car at gunpoint. See, A31. The Defendant was patted down and he had two capsules of cocaine in a sock. See, A32.

At this point in the transaction, a fellow officer, Sergeant Ahearn, reached into the car, turned off the ignition and removed the keys. See, A33. Subsequently, Ahearn called Officer Mendez to the trunk of the car. See, id. There, inside a speaker box, the officers found two kilos of cocaine. See, A2; A33-A34.

The State next produced Sergeant Ahearn, who testified that he had been a police officer for almost twenty-one (21)

years. See, A34a. Ahearn received information from Mendez that his C.I. had provided the information about the two kilo deal. See, A34b. Ahearn recalled the information and reiterated that the three black males were going to be in the red and white car; that a latin would be in the Mercedes and that a fourth black male would be in the Malibu. See, A34b-A34c. Ahearn said that the movement and return of the red Mercedes was the signal the deal, "had gone down." A34d. He corroborated the fact tht the "target car," the red and white car, left the scene, went to a "U-Totem" and eventually the officers caught up with it at a "Burger King." See, A34c-A34e. Sergeant Ahearn said that as he followed the participants into the parking lot, they

were talking and, "looking out the back and looking out the front and very nervous acting." See, A34h. Ahearn thereupon "signaled" that the Defendant should be stopped. See, A34i.

[No Hiatus]

Officer Shirley Harvard also testified as to the actual apprehension of the Defendant. See, e.g. A35-A36. Harvard said that no BOLO was put on the red and white car and that if a BOLO is used the officers would have "a plate." See, id. The remaining testimony of Harvard, Ahearn, Mendez and two other witnesses, Messer and Fonticello, see, A7a, added nothing of material significance to the present case.

At the close of the foregoing testimony, the State again complained that the Defendant had no standing to challenge the search of the trunk of the car. See, A36-A38. The trial court took the position that it would first consider the legality of the arrest without addressing the State's complaint as to standing. See, A36. The trial court's written order therefore finds the stop and arrest

illegal and fails to even mention the Defendant's standing to challenge the search:

" FACTS AS DETERMINED BY THIS COURT

This case arose out of an alleged tip about an alleged drug deal from a confidential informant who is 'never' wrong (Officer Mendez). The police did not attempt to secure a warrant. There has been no testimony of time being critical or 'of the essence'. Officr Mendez did not even testify as to when the alleged drug transaction would take place. Offcer Mendez' tip was not certain as to the type of car, whether three or four persons were involved, whether the car was a convertible or a vinyl top or two or four doors.

Nonetheless, the police set up surveillance not knowing when this alleged transaction would take place. Interestingly, the police did not have sufficient information to even issue a BOLO (Officer Mendez).

There was substantial confusion as to who or even what the officers would be looking for (Officers Mendez, Harvard, Ahearn, Fonticella). Amazingly, ...after Officer Ahearn's twenty-one years of experience told him that the Defendant's car was dirty--he moved in and authorized the stop and detention or arrest of the driver/defendant at gunpoint. Ultimately, this lead to a search of the trunk of the car where two kilograms of cocaine were found.

Parenthetically, two other persons occupied the car, but no charges were filed against these persons. Also, there was alleged information from this 'never' wrong confidential informant that another person driving a red Mercedes Benz would be involved in this drug transaction. This person was known to the police officers as a drug dealer but he was neither followed nor stopped.

FINDINGS OF THE COURT

1. That this Court puts no credence in Officer Mendez' 'never'[1] wrong confidential informant's tip, Officer Mendez could not present facts and details specific enough for the issuance of a BOLO. Additionally, if the police officer sought a warrant based upon the facts as presentd in this Court, a warrant would not issue from this Court.

2. That based upon the confused testimony of the police officers, this court finds that the testimony, overall, is not credible.

3. That during the time the police officers oberved the Defendant's car, if the police officers observed it

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[1]This Court recalls Logic 101 at the University of Florida wherein freshmen were taught to beware of the terms 'never' and 'always'.

> at all, there was no testimony that even indicated that the Defendant was engaged in any activity that was criminal or suspicious in nature. Further, the Court notes that although cocaine was found in the trunk, this does not justify the initial stop, detention, or arrest of the Defendant.
>
> 4. That under the totality of the circumstances, the stop of the Defendant's automobile was not justified. There ws no probable cause, no reasonable suspicion or no reason other than Officer Ahearn's twenty-one years of experience giving him the hunch that the car had contraband in it.
>
> 5. That based upon the foregoing, the Defendant's Motion to Suppress be and the same is hereby granted.
>
> A39-A43.

On appeal to the Florida Third District Court of Appeal, the State contended that the trial court's rejection

of the confidential informant's information, because his information was "never" wrong and "always" reliable, was without lawful basis and that the information presented was lawfully sufficient for probable cause. See, A43a-43b (Excerpt Brief on Appeal). Furthermore, the State complained that the trial court failed to apply the proper standard for review of standing and that the Defendant had no "standing" to challenge the search of the trunk of the car. See, e.g., id; A47-52. The district court, per Chief Judge Alan Schwartz, rejected the State's first complaint, concluding that the evidence "amply" supported the trial court's rejection of the informant's tip and its finding of no probable cause. See, A44-A45. The district court also specifically rejected this Court's views in

Rakas v. Illinois, 439 U.S. 128 (1978), holding that any Defendant had automatic standing to challenge any search upon the grounds that his arrest was illegal. See, id. The present petition follows.

V.

REASONS FOR GRANTING THE PETITION

A. STANDING

Rule 17.1(c) of the Rules of the Supreme Court entitled, "Considerations governing review on certiorari," provides that review by this Court is discretionary, but suggests that among the "special and important reasons" for granting certiorari are:

> "[w]hen a state court. . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

In the present case, the state court has both decided an important issue, which should be decided by this Court and has

decided the issue squarely contrary to this Court's apparent views in Rakas v. Illinois, 439 U.S. 128 (1978) as construed in Rawlings v. Kentucky, 448 U.S. 98 (1980).

In United States v. Salvucci, 448 U.S. 83 (1980), this Court abolished the concept of "automatic standing" to challenge a seizure. Therefore, under the Florida Constitution [2] and the United States Constitution, a defendant must establish his standing to challenge a seizure by proof under the totality of the circumstances that, "the person who claims the protection of the amendment has a legitimate expectation of privacy

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2. This Court's views in Rakas v. Illinois on standing have been expressly adopted by the Florida Supreme Court. See, Dean v. State, 478 So.2d 38 (Fla. 1985).

in the invaded place." See, Rakas v. Illinois, 439 U.S. 128, at 143 (1978); see also, United States v. Salvucci. Thus, a defendant has the sole burden to prove his standing to contest a search. See, Id.

In the present case, under Rakas v. Illinois and Rawlings v. Kentucky, the facts amply demonstrate that the Defendant had no expectation of privacy whatsoever in the search of the trunk of the car and thus no standing to challenge the search notwithstanding the fact that he was driving the car. The Defendant testified that many people drove the car; that on each occasion when he drove the car he would not return the car keys to the owner but rather simply left the keys in the car and left the car in a parking lot. The Defendant said that the windows of the car were always open and that he

was unaware if the trunk keys were with the car since he had never gone into the trunk of the car. However, specifically, construing and rejecting Rakas v. Illinois, the present district court reasoned that any defendant has automatic standing to challenge any search simply by challenging the validity of his arrest. A44-A45.

Rakas did not specifically involve a claim that the initial stop was invalid. 439 U.S. at 131. However, in Rawlings v. Kentucky, the defendant did claim, as in the case at bar, that the evidence was seized as the result of an illegal detention. 448 U.S. at 100. In its analysis of standing, the Kentucky Supreme Court, citing Rakas v. Illinois had "disregarded" the defendant's claim of an initial illegal detention as irrelevant to the issue of standing. See, 448 U.S.

at 103; id, at 113 (White, J. and Stewart, J., concurring in part). Similarly, Justice Rehnquist, construing Rakas v. Illinois and writing for the court, completely disregarded any claim of an illegal detention, in concluding that the defendant had no standing to raise any claim of an illegal search. Id, at 104-106. Indeed, in the latter portion of the Rawlings opinion, as to a secondary issue, Justice Rehnquist first assumes an illegal detention and then suggests that the detention may have been improper under Ybarra v. Illinois, 444 U.S. 85 (1979). Id, at 106-107; 110. Thus, the present decision by the state court has decided the issue of standing under the federal constitution in direct conflict with Rakas and Rawlings v. Kentucky.

This issue is also an important issue warranting the exercise of this Court's jurisdiction. The present Florida Third District Court of Appeal centered in Miami, Florida, is the leading appellate court in Florida and is one of the most prolific state courts in any jurisdiction. See, e.g., Florida v. Royer, 460 U.S. 491 (1983); Florida v. Rodriguez, 461 U.S. 940 (1983); Florida v. Zafra, 463 U.S. 1202 (1983); Florida v. Rodriguez, 469 U.S.___ (1984). As such, it also, therefore exerts a powerful influence on the law of search and seizure in all jurisdictions. See, Royer v. State, 389 So.2d 1007 (Fla. 3d DCA 1980)(Schwartz, J.); State v. Rodriguez, 389 So.2d 4 (Fla. 3d DCA 1980); State v. Zafra, 408 So.2d 745 (Fla. 3d DCA 1982) (Schwartz, J.). Miami, the location of the present district court, is also a

major drug terminal for the United States. See, United States v. Mendenhall, 446 U.S. 544 at 562 (Powell, J.; The Chief Justice and Blackmun, J., concurring). The present cause is therefore important to the exercise of jurisdiction from the standpoint of the importance of the decisions and court involved and the compelling interest in curbing narcotics traffic. See, Mendenhall, 446 U.S. at 561-562 (1980) (Powell, J., concurring); Florida v. Royer, 460 S.Ct. at 519 (Blackmum, J., dissenting). This Court should therefore exercise its jurisdiction under Rule 17.1(c).

B. PROBABLE CAUSE

In the present case, the officers had a timely and specific report of criminal activity from a very reliable informant (or even assuming an

unidentified citizen) of crimes taking place at a specific location using very specific cars. After observing this very specific combination, they at least had a lawful right to stop and search the red and white car with the three black males. See, Illinois v. Gates, 462 U.S. 213 (1983); Draper v. United States, 358 U.S. 307 (1959). In Gates, the officers had received anonymous information that the defendants would be transporting narcotics in a specific car with a specific license plate at a specific time. The basis for the informant's knowledge was unknown. After corroborating details of the tip and observing the defendants traveling at the time and in the car that the tip said they would, the police arrested the defendants and found three hundred and fifty (305) pounds of marijuana in their trunk. Citing Draper,

the Gates court announced that under the "totality of circumstances" test, the foregoing facts established ample grounds for a finding of probable cause and the issuance of a warrant:

> "Our decision in Draper v. United States, 358 U.S. 307, 79 S.Ct. 328, 3 L.Ed.2d 327 (1959), however, is the classic case on the value of corroborative efforts of police officials. There, an informant named Hereford reported that Draper would arrive in Denver on a train from Chicago on one of two days, and that he would be carrying a quantity of heroin. The informant also supplid a fairly detailed physical description of Draper, and predicated that he would be wearing a light colored raincoat, brown slacks and black shoes, and would be walking 'real fast.'"
>
> 462 U.S. at 242.

In the present case, contrary to the analysis in Gates and Draper, the state

trial court reasoned that because the informant had "always" been reliable and "never" failed to provide accurate information, that therefore he was inherently unbelievable and that his information did not amount to probable cause as a matter of law. See, A39-A43. This analysis flys into the face of Gates and Draper and all prior precedent[3]. See, e.g., Aguilar v. Texas, 378 U.S. 108 (1964); Spinelli v. United States, 393 U.S. 410 (1969). This Court therefore has jurisdiction herein and should exercise its jurisdiction to correct this egregious error.

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[3]. Under Article I, Section 12 of the Florida Constitution, the interpretation of the Florida Constitution and the United States Constitution are identical for purposes of search and seizure.

VI.

CONCLUSION

WHEREFORE, based upon the foregoing, this Court should accept jurisdiction.

RESPECTFULLY SUBMITTED, on this ____ day of August, 1986, at Tallahassee, Leon County, Florida.

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APPENDIX TO
BRIEF OF PETITIONER ON JURISDICTION

INDEX

ITEM	PAGE
Police Report [Excerpts].....	A2-A3
Motion to Suppress [Excerpts].	A4-A6
Hearing on Motion to Suppress [Excerpts].....	A7-A38
Argument on Standing.....	A8-A10
Defendant's Testimony on Standing.....	A11-A16
Argument on Standing.....	A16-A23
Officer Mendez.....	A23-A34
Officer Ahearn.....	A34a-A34
Officer Harvard.....	A35-A36
Argument on Standing.....	A36-A38
Order Granting Motion to Suppress.....	A39-43
State's Brief on Appeal.....	A43a-A43b
Opinion of Florida Third District Court of Appeals Affirming.....	A44-A46
Motion for Rehearing.....	A47-A52
Order Denying Rehearing.....	A53
Opinion of Florida Supreme Court Denying Review.....	A54-A55

BEST AVA

[EXCERPT POLICE REPORT OF J.C. MENDEZ]

The undersigned certifies and swears that he has just and reasonable grounds to believe, and does believe that the above named Defendant. On the 19 day of April, 1984, at 2:01 p.m. N.W. 7th & 36th Street committed the following violation of law; Narrative: On this date persuant (sic) to information received by a confidential source this writer set up a surviellance (sic) of the area of N.W. 7th Ave & 28th Street for a white Olds with a half red vinyl roof occupied by three (3) B/M's. Said vehicle was to be transporting two (2) kilos of cocaine (4.4 lbs). At approximately 1:50 P.M. this writer observed a vehicle fitting the discription leaving the area. This writer then advised Ofcs. Messer & Fonteciella that the veh was moving towards them. Ofcs Messer & Fonteciella observeded (sic) the veh at N.W. 7 Ave & 46

LABLE COPY

St.. This writer drove to that location and observed the veh as it made a series of turns in the Area. During this time the occupants of the vehicle continuously kept looking back at the police vehicle which was following them. Def the (sic) drove to N.W. 7 Ave & 36 St and pulled behind the Burger King and again the occupants began to look around. At that point the vehicle was stopped and the Def & Co-Defs ordered out. While patting the Def down this writer observed a small bulge in the Def's right sock. Upon pulling the sock away from the leg this writer observed a clear piece of plastic cont. two (2) clear plastic capsules cont. cocaine. Under the Carol Doctrine the veh was searched at which time these officers observed two (2) clear plastic bags cont. two (2) kilos (4.4 lbs) of cocaine in a partially open speaker box and $ in U.S. currency in the trunk.

---J.C. MENDEZ.

A4
[EXCERPT]

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY,

CASE NO. 84-9290

JUDGE: GERSTEN

THE STATE OF FLORIDA,

Plaintiff,

vs.

JOEL SCOTT,

Defendant.

MOTION TO SUPPRESS

The Accused, JOEL SCOTT, by and through undersigned counsel moves this Honorable Court, pursuant to Rule 3.190 (b) of the Florida Rules of Criminal Procedure, to suppress the evidence enumerated below as the product of an unlawful search and seizure.

1. Accused seeks suppression of the following evidence:

Cocaine found in accused's vehicle

Cocaine found in accused's personal possession

2. The following grounds are asserted in support of this motion:

a. That the property was illegally seized without a warrant.

b. That the evidence was obtained pursuant to an unlawful Search and Seizure Clause of the Fourth Amendment, the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article 1, Section 12 of the Florida Constitution.

3. This motion is based on the following general statement of facts:

The Accused was arrested by Officer J.C. Mendez and charged with trafficing in Cocaine and possession of a controlled substancce on April 19, 1984. The Accused was arrested after the police

had received a tip from a confidential informant that an alleged drug sale was to take place. The Accused's vehicle was stopped when it allegedly matched the vehicle described by the informant. The Accused was ordered out of his vehicle and searched producing a small quantity of alleged cocaine. The vehicle was searched and evidence seized which the accused now wish to suppress.

[EXCERPT]

IN THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

CRIMINAL DIVISION

CASE NO. 84-9290

JUDGE: GERSTEN

THE STATE OF FLORIDA,

Plaintiff,

vs.

JOEL SCOTT,

Defendant.

Motion to Suppress

Metropolitan Justice Building
Miami, Florida
December 3, 1984

The above-entitled cause came on for hearing before the Honorable David M. Gersten, Circuit Judge, pursuant to Notice.

APPEARANCES:

JOSEPH ROSENBAUM
Assistant State Attorney
State Attorney's Office
on behalf of the State of Florida.

AL JACKSON
Assistant State Attorney
State Attorney's Office
on behalf of the State of Florida.

MICHAEL KNOWLES
Esq.
on behalf of the Defendant.

I N D E X

Witness	Dr	Cr	RDr	RCr
Joel Scott				
(By Mr. Knowles)	23			
(By Mr. Jackson)		24		
J.C. Mendez				
(By Mr. Rosenbaum)	53			
(By Mr Knowles)		64		
(By Mr. Rosenbaum)			104	
(By Mr. Knowles)				105
Michael Ahearn				
(By Mr. Rosenbaum)	109			
(By Mr. Knowles)		119		
Shirley Harvard				
(By Mr. Knowles)	145			
(By Mr. Jackson)		162		
(By Mr. Knowles)			167	
(By Mr. Jackson)				168
(By Mr. Knowles)			168	
(By Mr. Jackson)				168
Wilfredo Fonticello				
(By Mr. Knowles)	171			
(By Mr. Rosenbaum)		181		
(By Mr. Knowles)			183	
Willie Messer				
(By Mr. Knowles)	185			
(By Mr. Rosenbaum)		192		
Michael Ahearn				
(By Mr. Rosenbaum)	194			

* * *

THE COURT: Back to Joel Scott. I don't mean to bounce around so much, but you know what Monday is like. We either have the motion to dismiss or the motion to suppress, whichever one you want to go on first, because it has the same effect.

MR. KNOWLES: Motion to suppress, first, Your Honor.

THE COURT: Is this a warrantless search?

MR. KNOWLES: Yes, it is.

THE COURT: State go forward.

MR. ROSENBAUM: Yes, we do. But the defendant has to establish stand[ing], that has to be accomplished first under Sal[vucci]. . .

THE COURT: Unless you want to agree to standing.

MR. ROSENBAUM: We do not

* * *

THE COURT: We have a problem on this motion to suppress, gentlemen. Our problem is Officer Messer there is no answer, Officer Fonticella, we left a message with a female, but nothing definite. Officer Harvard is the only one identified, that will be down here, and Officer Messer is out riding today. We have it without radio.

MR. ROSENBAUM: They have to establish standing, if they get by that, and establish standing, then it becomes State's burden. We can proceed with the witnesses that we have, then if they want to call additional witnesses, he can call whoever is here and he can put it off until tomorrow.

THE COURT: Here's the problem,

these are the witnesses you need for standing?

MR. KNOWLES: That's true, Judge.

MR. ROSENBAUM: Only the defendant can testify to standing, Judge.

THE COURT: That's not necessarily true.

MR. KNOWLES: Thank you.

THE COURT: What was that you agreed with that too?

MR. MacARTHUR: Yes.

THE COURT: Rather than putting the defendant on the stand, do you need these witnesses for your standing?

MR. KNOWLES: No, Judge, . . .

* * *

THE COURT: Defense, you are ready to go on the standing portion of the motion to dismiss?

MR. KNOWLES: Sure.

THE COURT: On the Joel Scott case, this is the memo?

THE COURT: All right. Now, we are going to go forward on the standing issue first, is that correct?

MR. KNOWLES: That's my understanding.

THE COURT: Go ahead.

Stand up, please sir, and raise your right hand. You can stay where you are.

(Thereupon, the Defendant was duly sworn by the Clerk of the County.)

BY MR. KNOWLES:

Q. State your name, for the record.

A. Joel Adolph Soctt, Junior.

Q. And, are you the defendant in the case of State of Florida versus Joel Scott?

A. Yes, I am.

Q. were you driving an automobile on or about April 19th, 1984?

A. Yes, I was.

Q. And, did you have permission

to drive that automobile?

A. Yes, I did.

Q. Were you arrested on that date, Mr. Scott?

A. Yes, I was.

Q. Were you -- do you recall who you were arrested by; by whom were you arrested?

A. City of Miami Police Officers.

Q. Do you recognize any of those people who arrested you here in the Court today?

A. Yes, I do.

Q. I don't have any further questions.

* * *

CROSS EXAMINATION

BY MR. JACKSON:

Q. Mr. Scott, on April 19th, 1984, you borrowed someone else's car?

A. Yes, I did.

Q. Whose car were you driving?

A. Lennie Anderson.

Q. Is he any relation to you?

A. No, he is not.

Q. When did you actually borrow his car?

[Objection and Discussion omitted].

MR. JACKSON: Maybe I can short-circuit if I can -- if you allow me to ask one other question.

THE COURT: It's an interesting issue, it doesn't come up very often.

MR. JACKSON: A box was removed from the trunk of the vehicle that you were driving, does that box belong to you?

THE DEFENDANT: No.

[Objection Overruled].

BY MR. JACKSON:

Q. When did you borrow the car?

A. The car was always available to us, for over a year to pick up materials, electrical materials. I'm in the electric business.

Q. When you say the car is always available to us; who is us?

A. The people who run the company.

Q. Like, for example, who else has access to the car?

[Objection sustained].

Q. Prior to the date you were arrested, when did you pick up the automobile -- car in question?

A. Invariably two or three times a week.

Q. Each time, did you return it to the owner?

A. Not directly to the owner, just parked the car in the parking lot.

Q. What did you do with the keys?

A. I leave the keys in the car.

Q. You leave the keys in the car?

A. Yes.

Q. And the date you were arrested, when did you pick up the car prior to that; did you pick it up from the parking lot?

A. Parking lot.

Q. It was just sitting in a parking lot?

A. About fifteen or an apartment area. They were used for construction purposes.

Q. What time that day did you pick up the car?

A. Probably -- I don't know. Maybe that morning -- 8:00 in the morning when I got to work.

Q. 8:00 in the morning?

A. Yes.

Q. Was the car open when you picked it up?

A. The windows?

Q. The windows were open?

A. It's always open. Different guys come in to use the car to pick up things. When they leave the keys in the car, then we turn the keys in at noon or whatever.

Q. I'm just dealing with the date in question. The date you were arrested, you picked up the car at 8:00 in the morning?

A. That morning.

Q. The windows were open when you picked it up?

A. I'm not really sure. The doors were open, the keys are always in the car.

Q. Was the trunk keys in th car also?

A. They could have been, I don't know. I didn't go to the trunk.

Q. Did you ever go to the trunk?

A. No.

[Objection omitted].

MR. JACKSON: Your Honor, this is a motion to suppress the evidence that was seized from the trunk of this automobile. It's not a hearing to determine whether he was arrested legally or not. In order

to deal with exclusion of evidence, as a sanction against the police, the police who has suffered the Fourth Amendment violation, has to come forth and establish standing. If Mr. Scott claims that he never entered that trunk of that vehicle or opened it, how could he have an expectation to the contents, expectation of privacy to the contents of that trunk? I agree that we are wasting time at this point, because it's clear that no Fourth Amendment right of Mr Scott's has been violated. As to the two kilos of cocaine that were found in a box in a locked trunk, which he had not expectation of privacy in, we can't go any further here, until we establish that. If Mr. Scott, assuming he was arrested, beaten, and in a variety of things happen to him; he would only have standing as to what was seized from him personally, not as to what was seized to

your house or my house or someone else's car. We are dealing with two different inquiries, Your Honor.

THE COURT: You don't have to argue law any further. I don't mean to cut you off. I'm pretty clear, I don't want to be getting confused in my mind.

* * *

THE COURT: But the theory you are traveling on its illegal arrest, to begin with.

MR. KNOWLES: That's correct.

THE COURT: Therefore, since the arrest itself was illegal, anything that came afterwards would be illegal as well.

MR. KNOWLES: Absolutely, that's the precedent I'm trying to advance. That's what I am arguing so long and repeatedly in that these questions have nothing to do with.

* * *

THE COURT: What are the standings for?

MR. JACKSON: Your Honor, it's clear -- maybe it has to be a little more research on the area of law that we are discussing. What is coming forth now, is the old rule, as to standing. You are talking about Jones, which gave automatic standing to a person.

THE COURT: Jones was mentioned in your case, as a matter of fact.

MR. JACKSON: Yes, Jones has been abolished, Your Honor. The thrust of any inquiry, I believe, it's specified right there in Rack[as] versus Illinois. Before you can get to the issue of an illegal activity or whatever, there has to be shown an evasion of privacy. We are talking about Fourth Amendment rights as a search and seizure in this case. We are not talking about seizure of the defendant, we are talking about a search of the automobile. We have two distinct arguments at this point in time.

* * *

MR ROSENBAUM: Under Draper, Under Carol, under Ross and under Drew, which is the Fifth [Circuit] Court of Appeals case. If Your Honor looks at all those, four cases which are the cases we are riding on, they had probable cause. In Gates versus Illinois and in this case, it's further than Gates versus Illinois. We have a reliable CI, whose proven his reliability, and the officers were corroborated consider the track record of the CI. There were independent observations; those actions are independent by and of themselves, but that coupled with what the CI said, is plenty for a probable cause, period. In Carol, a search pursuant to arrest -- Draper and Drew -- with nothing about the illegal arrest, so in order to go forward, the defendant has to establish standing that he had an expectation of privacy; a privacy in the

trunk of the car where the contraband is found. If he didn't control that area, he didn't have an expectation of privacy in that area. He doesn't have a reason to an objection to the Fourth Amendment.

For the record, the first thing he has to do is establish standing.

THE COURT: As Mr. Knowles gives his opening statement on the motion, I would like you to supply me with Carol, Ross, Draper, Drew and Gates; do you have those cases with you?

MR. ROSENBAUM: Yes, I do, Judge.

THE COURT: Give your opening, Mr. Knowles.

MR. KNOWLES: I would really rather not do that.

THE COURT: Let me take a look at those cases; I haven't been a Circuit Judge that long. I haven't heard it, it may be right or wrong.

* * *

THE COURT: Gentlemen, I think I have the right idea here; I may not be one hundred percent correctly reading the cases. I am familiar with all those cases, actually, it's just now something at least has been put in a clearer light here. Here is what I am going to suggest that we -- that the State go forward and start with the inception of I go and exercise futility that there was no standing for the cocaine in the car. Well then, fine, that might be another matter. I've already wasted two hours, I don't want to waste two more. On the other hand, if any defendant were carrying two pounds of cocaine oon their person, but so well concealed that it didn't look like a bulge of the leg or nothing; if that was the initial stop and the arrest and a search would be valid before you get to the trunk; let's not

worry about the trunk.

State, go forward. Let's say if I spend an extra hours of time. Time is what I have.

State, who do you want first?

MR. ROSENBAUM: J. C. Mendez.

* * *

DIRECT EXAMINATION

BY MR. ROSENBAUM:

Q. State your name, please.

A. J. C. Mendez.

Q. What do you do for a living?

A. I work for the City of Miami Police Department.

Q. How long have you been so employed?

A. As of July '80.

Q. And, on April 19th, 1984, in what capacity were you employed by the City of Miami Police Department?

A. I was a Plainclothes policeman assigned to the VIN Unit.

Q. What is the VIN Unit; your functions?

A. It's basically prostitution, some gambling, some low level street narcotics.

Q. On that particular day, did you become involved in an investigation which ultimately led to the arrest of the defendant in this case, Joel Scott?

A. I did.

Q. Do you see Mr. Scott in Court today?

A. Yes, I do.

Q. Could you point him out?

Indicating the defendant, for the record.

How did your investigation with the defendant start?

A. I got a telephone call from a reliable informant.

Q. What day did you receive that call?

A. The same day of the arrest.

Q. April 19th, 1984?

A. That's correct.

Q. What time, approximately, did you receive that call?

A. 11:15, 11:30 A. M.

Q. And what did that confidential informant -- strike that. This confidential informant, can you tell the Court has track record?

A. He's never been wrong.

[Objection Overruled].

Q. It was already asked and answered. Can you please tell the Court the track record of this confidential informant?

A. He's been reliable numerous times.

Q. Approximately how many arrests have been made with narcotics, with this confidential informant?

A. 20 or maybe more.

Q. How many narcotic seizures?

A. Numerous, I don't recall exact numbers.

Q. Has he ever -- he hasn't given you bad information?

A. No, never.

Q. On this day, what did the confidential informant tell you?

[Objection Overruled].

A. He advised me that it was a narcotic transaction of two kilos of cocaine. It was to take place in the 600 Block of 28th Street in the City of Miami, Northwest.

Q. Did he tell you at what time?

A. He didn't specify a time, he said they had negotiations going on.

Q. At the time he called you?

A. That's correct.

Q. Did he tell you -- describe for any of the individuals or automobiles that were going to be involved?

A. He did.

Q. Could you please tell the Court what he said?

A. He advised me three cars were involved. One was a red Mercedes Benz, two-door; the other one was a Buick or Oldsmobile, white with a half red vinyl roof. The other one was a silver or greenish Chevy Malibu.

Q. Did he tell you about any of the individuals that would be occupying those cars?

A. He said that there was a seller. He was a white Latin male, and the buyers were three or four black American males who occupied the Malibu, red on white vehicle, the Buick or Oldsmobile.

Q. Upon receiving this information, what did you do?

A. At that point, I advised my sergeant, Sergeant Ahern and myself and Officer Harvard left for the area, to set up a surveillance.

Q. And where did you set up on the surveillance, you specifically?

A. Myself and Harvard, we set up in the National Guard Amory, which is west of the location.

Q. On the same street?

A. That's correct.

Q. Is it on the same side of N. W. 7th Avenue, or on the other side?

A. It's on the other side of 7th Avenue.

Q. On the west side?

A. On the west side.

Q. From where you sat, could you see that location?

A. I could see the front part of it, just the front; just the front part.

Q. What did you see from that location?

A. I observed the red Mercedes and the white vehicle.

Q. Did there come a time when you made a pass by that area?

A. There did.

Q. What did you observed when you passed by that area?

A. At that point, I observed that the red over white vehicle was backed up to the location where the buy was supposed to take place with the trunk parallel to the side door. There was a black male sitting on the trunk of the vehicle, who later became known as Regenald Sanders.

Q. Did there come a time when you saw the red over white car leave that area?

A. Yes.

Q. Could you observe or see how many people were occupying that car at that time?

A. There were three black males occupying that vehicle.

Q. Did you ever see a Chevy Malibu, red or green or gray that day?

A. I did.

Q. When did you see that?

A. It ws the same time that both vehicles returned. When I saw both vehicles I mean, the Mercedes and the Malibu.

Q. Now, when you saw the red over white Oldsmobile leave, you said you saw three black males in the car; did you see Mr. Sanders in the car?

A. Yes, he was in the back seat.

Q. What direction did that car go when it left?

A. It first went west on 28th Street, then to 7th Avenue, then made a right turn and went north on 7th Avenue.

Q. Were you able to keep that car in your vision the entire time?

A. No, I lost it.

Q. Did there come a time when you picked it up?

A. Yes.

* * *

Q. Were you able to make an observation of the individuals occupying that car as it traveled southbound on N.W. 7th Avenue?

A. I did.

Q. What did you observe?

A. I observed the defendant was driving the vehicle, Regenald Sanders was in the back seat.

Q. Did you notice what they were doing, if anything?

A. They were looking around, especially Sanders in the back.

Q. What happened when the car pulled into the Burger King?

A. I can only relate to you from what I heard from Sergeant Ahearn.

Q. What did you do when you pulled into the Burger King?

[No Hiatus]

A. I proceeded south on 7th Avenue, set up on the following corner of 35th Street and 7th Avenue and waited for Sergeant Ahearn.

Q. What happened next; what did you do next?

A. Immediateely following that, Officer -- Sergeant Ahearn gave us the go ahead to stop the vehicle.

Q. What did you do?

A. I pulled up, and came up on 7th Avenue and entered a parking lot, and parked next to the defendant.

Q. What did you do?

A. At that point, we ordered all occupants of the vehicle out at gunpoint.

Q. Why at gunpoint?

A. Based on our experience, we found that people involved in narcotics tend to usually carry guns and are very protective of them.

Q. Did you find a gun in this case?

A. We did.

Q. Who did you take out of the car, if anyone?

A. The defendant.

Q. Where was he sitting in the car when you took him out?

A. The driver's seat.

Q. What did you do then?

A. At that point, I patted him down.

Q. Why?

A. For my safety and for the others around me.

Q. What happened when you patted him down?

A. I found in his sock there was a plastic piece of -- plasticc containing two capsules of cocaine.

Q. Once you found that, what did you do?

A. I placed the defendant under arrest, based upon that.

Q. You placed him under arrest, for possession of cocaine?

A. Yes.

Q. Is this before or after the trunk was opened?

A. Before.

Q. Now, did you observe Sergeant Ahearn do something when you wre attending to Mr. Scott?

A. I did.

Q. What did you see him do?

A. I observed him reach in, turn the key off, take the keys out, go to the trunk, and open the trunk.

Q. Did there come a time when he called you back to the trunk?

A. There did.

Q. And what did you find in the trunk; what did you see in the trunk?

A. In the corner -- standing in the front of the trunk in the left-hand corner, just near the light assembly,

there was a Jensen speaker box and in it, contained two plastic bags of suspected cocaine.

Q. What happened; after you observed the cocaine, what did you do?

A. At that point, the trunk was closed again, and the vehicle was driven to the station by Sergeant -- I mean -- correction, by Officer Harvard.

* * *

REDIRECT EXAMINATION

BY MR. ROSENBAUM:

Q. The description you got from the Confidential Information, did he tell you something specific about the Malibu?

A. It had out of state tags.

Q. Did you have a chance to see them?

A. They were Jersey plates.

* * *

[EXCERPT: SERGEANT AHEARN]

DIRECT EXAMINATION

BY MR. ROSENBAUM:

Q. State your name, please.

A. Michael Ahearn.

Q. What do you do?

A. I'm a police sergeant with the City of Miami Police Department.

Q. How long have you been employed with the City of Miami Police Department.

A. 21 years in January.

Q. What division were you assigned to in April 19th, 1984?

A. I am supervisor of the VIN Units.

Q. How long have you been supervisor of the VIN Unit?

A. Going on four years.

Q. And you supervise an officer by the name of J. Mendez?

A. Yes, I do.

Q. On April 19th, 1984, did you become involved in an investigation which resulted in the arrest of the defendant, Joel Scott?

A. Yes, I did.

Q. Do you see him here today?

A. Yes, the gentleman in the white shirt, to my left.

MR. ROSENBAUM: Identifying the defendant for the record.

Q. How did you become involved in this investigation?

A. I was contacted by Officer Mendez, in reference to information he had received that morning, from one of our Confidential Informants we have used in the past.

Q. Based on that information, what did you do?

A. He advised me that he set up in a place up on 7th Avenue, off 7th Avenue, N.W. 28th Street, and briefly gave me a summary of what was going -- supposedly going to take place up there.

Q. What did he tell you?

A. He advised me --

[Objection Overruled].

MR. ROSENBAUM: Please continue.

A. He advised me that the CI had contacted him that morning, and advised him that a two kilo coke deal was going to go down at the apartment of approximately 670 N.W. 28th Street. He advised me the deal would consist of a Latin male in a red Mercedes, there would be three black males involved, driving a red over white, either Oldsmobile or Buick, and a possibility of another black male, driving maybe an old Malibu, either green or blue.

Q. Where did you set up?

A. I went up there -- I drove on up there and spoke briefly with him, after he had called me, and got out of line of what was going on physically. From there and at that point shortly thereafter, the red Mercedes had left and Officer Mendez was advised that once the red Mercedes had returned to the apartment house there, then that would show that the deal apparently had gone down.

Q. Where were you stationed at that point; where was your car?

A. I went to 7th Avenue and 25th, about three blocks south of the area.

Q. Did there come a time when you learned that the red over white Olds or Buick had moved?

A. Yes, I did.

Q. Tell us then about that.

A. At the time, we were advised it was moving, I was in the process of trying to get some Uniformed cars and advising them what I wanted, and which was to stop the car when it left the area. However, due to problems getting on the air at that time, the car did leave. I was advised by J. C. Mendez that the car had left -- one car had gone west on 28th Street, which woulld have been the green Malibu, occupied by one black male. The target car, the red over white which contained three black males, went northward on 7th Avenue. Previously, I had people stationed north and south of the police to try to make sure that we did have good coverage of the car they had left.

Q. Once you learned the car had left, did you get a description on that car?

A. I went up to 7th Avenue, in the area of 42nd Street. I was advised that the car was at a U-Totem up there and was leaving, and took a route of going south on 6th Court or 6th Court I believe south on this which runs along the expressway back west on 42nd Street.

Q. And, about where did you see it?

A. I saw it going south on 7th Avenue.

Q. Who was following; which officers were following this target vehicle?

A. At that time, it was Officer J. C. Mendez in an unmarked car -- a plain car, and there was also Officer Fonticella and Officer Messer, who both of those were in a white unmarked Ford.

Q. And were you able to observe the progress of the target vehicle?

A. At that time, going south, yes.

Q. What did you observe happen?

A. The car went south on 7th Avenue to N.W. 42nd Street, where it made a right-hand turn. At that point, Officer Mendez was ahead of me and continued straight on. I made the right-hand turn with the target car, and the car pulled into the rear of Burger King, which is located on the southwest corner of N.W. 7th and 36th Street.

Q. Were you able to see the car pulling in the Burger King?

A. Yes, I was right behind them.

Q. Did you see where he pulled in Burger King?

A. He pulled right behind the main portion of Burger King and stopped.

Q. Did he park in a parking space?

A. No, it was like a drive through area. He stopped like right in the middle of the building, right behind it.

Q. Was he in the drive through lane?

A. No.

Q. Was he appearing to be going into the drive through area?

A. No, I proceeded through the drive through lane, it's like a pass through, where you don't have to go through the drive in. I pretended like I was going in to order something.

Q. Were you able to observe the occupants of the target vehicle?

A. Yes.

Q. How many were there?

A. Three occupants in car.

Q. Were you able to see if they were doing anything?

A. They were talking to each other, they were looking out the back and looking out the front and very nervous acting.

Q. What happened? At this time, what did you do?

A. At that point, I felt they were dirty, and I advised that we were going to go take them off.

Q. What do you mean by dirty?

A. That they had they cocaine inside the car.

Q. You signaled for the stopping of the car?

A. Yes, they started -- at that time, they started to go ahead in the parking lot. At that point, I advised to go ahead and take them off.

Q. That was your decision, when to stop the car and search it?

A. Yes.

Q. Why did you wait, why didn't you do it later on?

A. A couple of reasons. I wasn't sure at that point. I wanted to be on the stop, I was kind of in the tail end of it. I wanted to make sure everything was okay. J. C. Mendez advised he lost it. Officer Messer and Fonticella, they didn't advise right away they were on the car, they weren't sure if it was the car. They saw the car leave, and pulled out behind the car.

Q. When did you become sure that was the car?

A. When Officer Mendez advised that was the car.

* * *

[EXCERPT DIRECTION EXAMINATION: -- OFFICER HARVARD].

Q. You heard him tell them what kind of car it was?

A. He told them it was red over white vehicle and he gave them -- he advised them that it was three black males occupying that vehicle.

Q. Okay. So you are on 29th Street and 7th Avenue and he told Messer and Fonticella it was a red over white what?

A. I can't recall if he said Oldsmobile or Buick. At one point, we didn't know if it was an Oldsmobile or Buick.

Q. Did he give them a plate on it?

A. I don't remember.

Q. You don't remember?

A. No, I don't.

Q. Did you put a BOLO out on him?

A. No, we didn't.

Q. If you put out a BOLO, you usually have a plate right?

A. Yes.

* * *

[EXCERPT OF ARGUMENT]

THE COURT: You can have a seat outside. Let's have a summation, gentlemen.

* * *

MR. ROSENBAUM: What about the standing issue that hasn't been ruled on?

THE COURT: I have to cross this barrier first before I can get to the standing.

MR. ROSENBAUM: Our theory is you have to cross standing before, because our standing is bad.

THE COURT: Argue on everything, gentlemen, cover every piece of grounds you can possibly cover and I'll be listening intentively.

* * *

THE COURT: State.

MR. JACKSON: Your Honor, I would first mention that the thrust of the argument is that two kilos of cocaine was taken from the trunk of a car, which clearly has not been established the defendant had any expectation of privacy in the trunk. The defendant testified under oath that the car as left in a parking lot by it's owner where it's continuously left unlocked, with the keys in the car and many different people use that car. The defendant also testified that he did not place anything in the trunk of the car, did not realize he had

* * *

[W]e don't know whether the defendant had the car an hour, half an hour, just during the time we saw the surveillance and during that time, it's clear that the officers did not see him put

anything from there, so I would first argue for the record, that there is not standing in this case for the defendant.

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA CRIMINAL DIVISION

CASE NO. 84-9290 (Gersten)

STATE OF FLORIDA,

Plaintiff,

vs.

JOEL ADOLPH SCOTT,

Defendant.

ORDER ON MOTION TO SUPPRESSION

* * *

FACTS AS DETERMINED BY THIS COURT

This case arose out of alleged tip about an alleged drug deal from a confidential informant who is "never" wrong (Officer Mendez). The police did not attempt to secure a warrant. There has been no testimony of time being critical or "of the essence". Officer Mendez did not even testify as to when the alleged drug transaction would take place. Officer Mendez' tip was not certain as to the type of car, whether three or four

persons were involved, whether the car was a convertible or a vinyl top or two or four doors.

Nonetheless, the police set up surveillance not knowing when this alleged transaction would take place. Interestingly, the police did not have sufficient information to even issue a B.O.L.O. (Officer Mendez). There ws substantial confusion as to who or even what the officers would be looking for (Officers Mendez, Harvard, Ahearn, Fonticella). Amazingly, to make this factual pattern short and succinct, after Officer Ahearn's twenty-one years of experience told him that the Defendant's car was dirty---he moved in and authorized the stop and detention or arrest of the driver/defndant at gun point. Ultimately, this lead to a search of the trunk of the car where two kilograms of cocane were found.

Parenthetically, two other persons occupied the car, but no charges were filed against these persons. Also, there was alleged information from this "never" wrong confidential informant that another person driving a red Mercedes Benz would be involved in this drug transaction. This person was known to the police officers as a drug dealer but he was neither followed nor stopped.

FINDINGS OF THE COURT

1. That this Court puts no credence in Officer Mendez' "never"[1] wrong confidential informant's tip. Officer Mendez could not present facts and details specific enough for the issuance of a B.O.L.O.. Additionally, if the police officer sought a warrant based upon the facts as presented in this

---

[1] This Court recalls Logic 101 at the University of Florida wherein freshmen were taught to beware of the terms "never" and "always".

Court, a warrant would not issue from this Court.

2. That based upon the confused testimony of the police officers, this Court finds that the testimony, overall, is not credible.

3. That during the time the police officers observed the Defendant's car, if the police officers observed it at all, there was no testimony that even indicated that the Defendant was engaged in any activity that was criminal or suspicious in nature. Further, the Court notes that although cocaine was found in the trunk, this does not justify the initial stop, detention, or arrest of the Defendant.

4. That under the totality of the circumstances, the stop of the Defendant's automobile was not justified. There was no probable cause, no reasonable suspicion or no reason other than

Officer Ahearn's twenty-one years of experience giving him the hunch that the car had contraband in it.

5. That based upon the foregoing, the Defendant's Motion to Suppress be and the same is hereby granted.

[EXCERPT STATE'S BRIEF ON APPEAL]

SUMMARY OF ARGUMENT

1) The trial court manifestly erred in refusing to address the Defendant's standing to challenge the propriety of the seizure of cocaine.

2) The Defendant had no reasonable expectation of privacy to challenge the seizure of cocaine from the trunk of the car.

3) There was no lawful basis for the trial court's unusual assertion that it did not believe the informant's tip and its general assertion that because of unspecified "confused testimony" the testimony of all five (5) police officers was not credible.

4) The trial court's legal assessment of the evidence presented files into the face of settled precedent. The officers had ample information, which they corroborated by their collective observations that it was likely that a drug transaction was about to or had taken place. The trial court's focus upon and substantial consideration of whether the other participants were arrested, is legally irrelevant and plain reversible error.

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JULY TERM, A.D. 1985

CASE NO. 84-2699

THE STATE OF FLORIDA,

Appellant,

vs.

JOEL ADOLPH SCOTT,

Appellee.

Opinion filed December 17, 1985.

An Appeal from the Circuit Court for Dade County, David M. Gersten, Judge.

Jim Smith, Attorney General and Calvin L. Fox, Assistant Attorney General, for appellant.

Michael J. Knowles, for appellee.

Before SCHWARTZ, C.J. and NESBITT, and JORGENSON, JJ.

SCHWARTZ, Chief Judge.

Having concluded that Scott was unlawfully arrested in the absence of

probable cause, the lower court suppressed cocaine discovered in the ensuing search of the car he was driving at the time. We affirm on the grounds that (a) the factual findings made below are amply supported by record considered in the light of the express credibility determinations of the trial judge with which we may not interfere, DeConingh v. State, 433 So.2d 501 (Fla. 1983), cert. denied, __U.S.__, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984); and (b) contrary to the state's contention, based on Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), that the defendant lacked "standing" to contest the search because he did not own the vehicle, it is necessarily the case that one may challenge a seizure incident to his own arrest on the ground that the arrest itself was illegal. Kersey v. State, 58 So.2d 155 (Fla. 1952); Hansen v. State, 385 So.2d 1081

(Fla. 4th DCA 1980), cert. denied, 392 So.2d 1379 (Fla. 1980); see State v. Conger, 183 Conn. 386, 439 A.2d 381 (1981)(even driver of stolen car may challenge vehicle search on ground of illegality of stop or arrest, because such search follows violation of personal right to free movement; distinguishing Rakas as not involving any challenge to the constitutionality of the initial stop or arrest); LaFave, Search and Seizure § 11.3 (1978), and cases collected at 282-91 (Supp. 1985).

Affirmed.

A47
[EXCERPT]
IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

CASE NO. 84-2699

THE STATE OF FLORIDA,

Appellant,

vs.

JOEL ADOLPH SCOTT,

Appellee.

MOTION FOR REHEARING AND
MOTION FOR REHEARING EN BANC

COMES NOW, the Appellant, THE STATE OF FLORIDA, by and through its undersigned counsel and submits this Motion for Rehearing and Motion for Rehearing En Banc and as grounds therefor shows:

I

1.) That the Appellant is in receipt of this Court's opinion filed on December 17, 1985, in which this Court affirms the granting of the Defendant's motion to suppress upon a conclusion that, a) the factual findings made below are supported by the record and b) that

the Defendant did have standing... irrespective of any reasonable expectation of privacy...the Defendant himself testified that many people drove the car; that on each occasion when he drove the car he would not return the car keys to the owner but rather simply left the keys in the car and left the car in a parking lot. See, T32-T33. The Defendant said that the windows of the car were always open and that he was unaware if the trunk keys were with the car since he had never gone into the trunk of the car. See, T34-T35.

2.) That in United States v. Salvucci, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), the United States Supreme Court abolished the concept of "automatic standing" to challenge a seizure. Under the Florida Constitution and the United States Constitution,

therefore, a defendant must establish his standing to challenge a seizure by proof under the totality of the circumstances that, "the person who claims the protection of the amendment has a legitimate expectation of privacy in the invaded place." See, Rakas v. Illinois, 439 U.S. 128, at 143, 99 S.Ct. 421, at 430; 58 L.Ed.2d 387 (1978); see also, United States v. Salvucci, supra; United States v. Torres, 720 F.2d 1506 at 1510 (11th Cir. 1983). Thus, a defendant has the sole burden to prove his standing to contest a search. See, Id.

In the present case, the foregoing facts amply demonstrat that the Defendant had no expectation of privacy whatsoever in the search of the trunk of the car, notwithstanding the fact that he was driving it. See, United States v. Lochan, 674 F.2d 960 (1st Cir. 1982); United States v. Smith, 621 F.2d 483 (2d

Cir. 1980); People v. Flowers, 111 Ill. App. 3d 348, 444 N.E.2d 242 (1982); State v. Emery, 41 Or. App. 35, 597 P.2d 375 (1979). However, this Court in its opinion did not address the issue of the Defendant's reasonable expectation of privacy but rather concluded that the Defendant had automatic standing to challenge any search pursuant to his arrest. Most respectfully, this is an incorrect view of United States v. Salvucci and the principles explained in Rakas v. Illinois. See also, United States v. Lochan; United States v. Smith; People v. Flowers; State v. Emery, supra. The Supreme Court of Florida recently expressly adopted the reasoning in Rakas v. Illinois, for all standing issues in, Dean v. State, Case No. 63,711 (Fla. October 31, 185). In so ruling, the

Court in Dean held that standing must be addressed as part of the substantive Fourth Amendment issues in every case. Therefore, in the present case, the trial court's failure to rule upon the issues of fact governing the question of standing in this cause was plainly reversible error. Cf, also, Goodwin v. State, 450 So.2d 582 (Fla. 3d DCA 1984); State v. Doyle, 409 So.2d 1168 (Fla. 3d DCA 1982); Morales v. State, 407 So.2d 321 (Fla. 3d DCA 1981).

3.) That the issue presented herein as to the driver of a car having standing to contest the search of a trunk in which he demonstrates no reasonable expectation privacy, is a case of first impression in Florida. This Court in its opinion has grafted upon the concept of no automatic standing, an automatic standing conferred upon any defendant by virtue of the fact that he has been arrested. Because of

these reasons, the undersigned expresses a belief based upon a reasoned and studied professional judgment, that the present panel decision affirming the motion to suppress in this case, is of exceptional importance and requires this Court's en banc review.

* * *

RESPECTFULLY SUBMITTED on this 31st day of December, 1985, at Miami, Dade County, Florida.

JIM SMITH
Attorney General

CALVIN L. FOX, ESQ.
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(305) 377-5441

A53

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1986

FRIDAY, JANUARY 24, 1986

CASE NO. 84-2699

THE STATE OF FLORIDA,

Appellant,

vs.

JOEL ADOLPH SCOTT,

Appellee.

Upon consideration, appellant's motion for rehearing is hereby denied.

A True Copy

ATTEST:

LOUIS J. SPALLONE

Clerk District Court of
Appeal, Third District

IN THE SUPREME COURT OF FLORIDA

FRIDAY, JUNE 27, 1986

CASE NO. 68,403

Third District - No. 84-2699

STATE OF FLORIDA

Petitioner,

vs.

JOEL ADOLPH SCOTT

Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R.App.P. 9.330(d).

Respondent's Motion to Dismiss

Petitioner's Brief on Jurisdiction is denied.

OVERTON, McDONALD, EHRLICH, SHAW and BARKETT, J.J., concur

A TRUE COPY

TEST:

Sid J. White
Clerk Supreme Court